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ENFORCING THE DECISIONS OF OMBUDSMEN — THE NORTHERN IRELAND LOCAL GOVERNMENT OMBUDSMAN'S EXPERIENCE

INTRODUCTION

In the mid 1980s a topic of considerable concern to the Commissioners for Local Administration in England and Wales, and their counterpart in Scotland, was how to secure the compliance of local authorities with those of their reports finding maladministration. The "failure rate" (the number of reports not complied with, referred to in the statistics as "unsatisfactory outcomes", expressed as a percentage of the total number of reports finding maladministration) was, at that time, approximately 6 per cent, 4.4 per cent and 5 per cent in England, Wales and Scotland respectively.¹ This prompted a search for a more effective method of enforcement and in doing so provoked some debate about how best to enforce ombudsmen's reports and about how best ombudsmen should function. The suggestion that initially found favour with the Commissioners was court enforcement. However, this idea seemed to run counter to the accepted understanding of ombudsmanship. According to the classic formulation ombudsmen are intended to operate by use of persuasion, reason and conciliation, and all in an informal manner. Resorting to the courts in order to ensure that some of their judgments would be implemented seemed to be contrary to this.

The issue was taken up in 1985 by the Select Committee on the Parliamentary Commissioner which devoted its third report to the issue, and recommended that its jurisdiction be extended to allow it to perform the same function in relation to the local government ombudsmen that it performs with regard to the Parliamentary Commissioner for Administration.² Court enforcement could be resorted to if the involvement of the Committee failed to have the desired effect. It also featured in the Widdicombe Report which recommended that court enforcement be adopted, based, it appears, on the views then held by the Commissioners.³ However, the model of enforcement ultimately implemented, by the Local Government and Housing Act 1989, was not court enforcement. The 1989 Act has furnished British local government ombudsmen with a form of enforcement power very much in keeping with traditional ombudsmanship. Following a finding of maladministration sustaining injustice, the local authority is required to consider the report and respond within three months. If it fails to respond to the satisfaction of the ombudsman a further report can be issued. Failure to comply with that means that the ombudsman may compel the local authority to publish, in a local newspaper, a statement of the reasons for its refusal to comply with the report and an account of how an

1. "The Conduct of Local Authority Business", Cmnd 9797 (1986) (hereafter referred to as the Widdicombe Report) para 9.67.
2. "Local Government Cases: Enforcement of Remedies", HC 448 (1985-86) (hereafter "Select Committee Report").
3. Widdicombe Report, paras 9.68, 9.69 and 9.83.

impasse has been reached.⁴ The system, which has been in place since 1990, has produced 35 statements⁵ and on only one occasion has the issuing of a statement led to a "satisfactory outcome".⁶ The provision is an odd form of enforcement in that it usually results in two "injustices". The injustice suffered by the complainant is not remedied and there is a second, collective, "injustice" suffered by the taxpayers of the local authority in question, who must ultimately foot the bill for the newspaper advertisement. Presumably the rationale of the power is that, through the ballot box, the electorate will "punish" those local authorities who refuse to implement the local government ombudsmen's decisions. In 1990-91, the first full year of the new mechanism's operation, the "failure rate" in England and Wales was slightly in excess of 6 per cent. The annual rates of unsatisfactory outcomes since then cannot yet be finalised as a number of complaints await settlement. Whilst the "failure rate" may very well fall, the actual number of unsatisfactory outcomes remains high, indeed higher than it was in the mid-eighties, and the issue does not appear to have disappeared.

It is likely that the present system will remain in place for a number of years to come but the question of whether or not reports of the ombudsmen should be enforced by the courts has not disappeared entirely. Government issued a warning to local authorities, in the "Citizen's Charter",⁷ that should the rate of non-compliance with ombudsman decisions rise again it would consider the introduction of a court enforcement power like that in use in Northern Ireland. Government may not be very serious about implementing the threat and the ombudsmen are not now advocating such a move.⁸ If it does at some future date seriously consider introducing the Northern Ireland model then detailed consideration should be given as to how it works and, probably more importantly, the environment in which it works.

THE NORTHERN IRELAND MECHANISM

Section 7 of the Commissioner for Complaints Act (NI) 1969⁹ allows the aggrieved individual to apply to the county court to have the ombudsman's

4. Ss 26 and 28 introduced the power for the English and Welsh ombudsmen whilst ss 27 and 29 did the same for the Scottish ombudsman.
5. Annual Report of the Commission for Local Administration in England, 1992-93, p 63.
6. Annual Report, 1992-93, *op cit*, p 44.
7. "Citizen's Charter — Raising the Standard", Cm 1599 (1991), p 43.
8. Annual Report 1992-93, *op cit*, pp 8 and 45.
9. The awkward structure of the Northern Ireland ombudsman's office is deserving of a lengthy explanatory footnote. The office is really two ombudsman's offices in one; that of the Parliamentary Commissioner for Administration and that of the Commissioner for Complaints. Both these offices derive their validity from two separate Acts, in 1969, of the "old" Northern Ireland Parliament. The former investigates complaints against the regional governmental administration (*ie* the six Northern Ireland governmental departments which function under the aegis of the Northern Ireland Office) whilst the latter accepts complaints against local government and a variety of local bodies. These local bodies include not only the local district councils but the five Education and Library Boards; the four Health and Social Services Boards and the regionalised housing authority, the Northern Ireland Housing Executive, amongst others. The commonality between both titles — the word "Commissioner" — is the title by which the offices are referred to in the legislation and indeed by the office staff. However, I have used the title "ombudsman" throughout except when quoting from the legislation.

report upheld and a suitable remedy prescribed by the court. The court is empowered to award damages to compensate the complainant for any expense incurred in relation to the act of maladministration and for the loss of opportunity of acquiring benefit as a result of the maladministration.¹⁰ Injunctions may also be issued. Provision is made allowing the Attorney-General to apply to the High Court for an order where the body complained against had engaged in "continued and determined maladministration".¹¹ The ombudsman's report "shall, unless the contrary is proved, be accepted as evidence of the facts stated therein".¹² Under the County Court Rules governing the making of an application, the complainant has six months from the issuing of the reports in which to make the application.¹³

Parliamentary debates provide no clues as to why court enforcement of the ombudsman's reports was the chosen sanction. The inclusion of the power in the Bill provoked no comment in the Northern Ireland House of Commons. However, correspondence between the Ministry for Community Relations, the Director of the Commissioner for Complaints office and the First Legislative Draftsman's office do shed some light on the section. In the course of that correspondence, the First Legislative Draftsman stated that when the Bill was being drafted it was felt that it was "highly desirable to avoid giving the impression of over-controlling local and public bodies so as to make it more difficult to get persons of proper standing to play a full part in local government" and therefore the principle was that the "Commissioner should in the first instance proceed by way of investigation, negotiation and attempted settlement, leaving legal sanctions very much as a last resort".¹⁴

Given the political climate prevailing in Northern Ireland when the office was founded and that part of the office's role was to combat discrimination, provision for the court enforcement of ombudsman's reports is understandable.¹⁵ The "Notes on Clauses" relating to the provision allowing the applicant to recover for loss of opportunity seems to provide further evidence to support the suggestion that the power was introduced mindful of the office's remit to tackle discrimination. They make it clear that it was intended that it should be possible for a complainant to recover even

10. Subs 9 allows that the normal jurisdictional limits of the county court do not apply, whilst subsection 10 holds that nothing in the section affects the right to bring any other proceedings, criminal or civil.

11. S 7(5). To date there has been no occasion when the Attorney-General has had to exercise this power.

12. S7(8). The ombudsman, or a designated official, may sign a "Certificate of Authenticity" verifying the report.

13. S. R. & O. 1971 No 178 Rule 2(2). It is now almost impossible to ascertain whether the six-month rule has been complied with in the past. In fact when the solicitors for the applicants in one case requested the ombudsman to send details of the cases that had been pursued even though they were outside the six-month time limit (in order that they might cite those cases as precedents) the ombudsman's office was unable to oblige.

14. Letter from the First Legislative Draftsman to an official in the Ministry of Community Relations, 26 October 1970.

15. On this point see Himsworth, "Judicial Teeth for Ombudsmen?" Proceedings of a Conference held at the University of Edinburgh, 13 December 1984, p 55.

where he or she could not show that the benefit in question would have been granted. The "Notes on Clauses" state:

"It will be noted that under [loss of opportunity] the compensation is not limited to actual material loss in the strict sense that it will be necessary to prove that but for the maladministration the person aggrieved would have got the job, house or other benefit in question. Such a requirement would be unduly restrictive and would in certain cases (*eg* employment applications) impose a burden of proof which could be rarely discharged."

In at least one case the judicial interpretation reflected this view.¹⁶ When awarding one applicant £200 damages (plus costs) for being wrongly denied an opportunity to be interviewed for a job the judge stated that

"her chances of being appointed to this post were in my opinion very slim, almost negligible. The commercial post to which she was later appointed was more highly paid and caused an immediate advantage to her."¹⁷

It seems to have been anticipated that cases could arise where the maladministration amounted to discrimination but, as is often the case with allegations of discrimination, that definitive factual proof would not be easy to find given that the reasons for the decision are often known only to the decision-maker(s).

Throughout the history of the office, 32 county court applications have been made under this power, representing approximately 6 per cent of all findings of maladministration made by Northern Ireland's local government ombudsman.¹⁸ Whilst this small number suggests that the court enforcement option is infrequently exercised, it is worth noting that this rate is the same as the rate of "unsatisfactory outcomes" in England and Wales. Half the applications have been against local district authorities, with the other half against some of the local and public bodies which exercise many of those powers usually exercised in Great Britain by local authorities.

The court award is usually, though not necessarily, a monetary one. The damages have ranged from an award of £9.98 made against Dungannon UDC in one of ten cases where the council incorrectly docked the pay of ten of its employees for failing to attend at work in protest at the Government's introduction of internment in 1971,¹⁹ to an award of £100,064 in a case against Craigavon Borough Council because the council incorrectly refused to lease land to a GAA club.²⁰ The only case in which a monetary award was not made by the court was in the most recent case. In that case, against Cookstown District Council, the Court decided that the best way to ensure a remedy against the Council's improper refusal to give proper consideration to correspondence from a tenant's association (the Council believed members of the association to be members of Sinn Féin) was to order it to

16. Complaint CC186/76 v Northern Ireland Housing Executive.

17. The then Belfast Recorder, Topping J, quoted in the *Belfast Telegraph*, 16 March 1977.

18. Calculation based on figures contained in the Northern Ireland ombudsman's Annual Reports.

19. CC426/71.

20. CC573/79.

give full consideration to all future correspondence from the association.²¹ Seven applications have been settled out of court for some substantial sums.²²

In only one case did the court refuse to make an order for the applicant and that was in the very first application. This was that because whilst the ombudsman found that the complainant had been a victim of maladministration he concluded that the complainant had suffered no injustice as a result.²³ The court did not then need to make an award to remedy any injustice. It is unclear how this case managed to reach the court.

The right of appeal to the High Court, under section 7(4), has been exercised only once. The appeal, like the initial hearing, was concerned only with the level of damages.²⁴ As explained later no question of rearguing the finding of maladministration arises, nor has it arisen in practice. The case involved Craigavon BC's refusal to grant a lease to a GAA club to allow it to develop sporting facilities.²⁵ The outcome of the appeal was a reduction in damages payable to the club, from £107,763 to £100,064, and a stipulation that the club should make a payment to acquire the leases.²⁶

There are, perhaps, two key issues in assessing the operation of the provision. The first is the extent to which the ombudsman's report can be challenged and the issues reviewed in the county court.²⁷ In the course of framing the County Court Rules, under section 7(2), this particular issue loomed large. Whilst subsection 2 indicates that no challenge could be made to the report "in these proceedings", subsection 8 seems to contradict this by providing that the ombudsman's report "shall, unless the contrary is proved, be accepted as evidence of the facts stated therein". This apparent ambiguity prolonged the making of the Rules. The difficulties were eventually laid to rest by the First Legislative Draftsman. In a letter to an official in the Ministry of Community Relations, he wrote that:

21. CC130/85.

22. CC671/78 v North Eastern Education and Library Board (4 applications in one); CC129/75 v Pigs Marketing Board; CC40/72 v Coleraine, Portrush and Portstewart Waterworks Joint Board; CC1003/70 v Northern Ireland Housing Executive.

23. CC507/70 v Purdysburn Hospital Management Committee.

24. In fact the appeal judge, Lord Lowry LCJ, in the course of his judgment stated that "the hearing on appeal has therefore, literally speaking, been an exercise in damage limitation". (18 NIJB 21 at 23).

25. CC 573/79 v Craigavon Borough Council.

26. The case remains the *cause célèbre* of Northern Ireland ombudsmanship because following the appeal to the High Court the Local Government Auditor surcharged a number of the councillors, thereby making them ineligible to sit as councillors for a period of five years. The councillors appealed against the Auditor's decision and succeeded in having the sum reduced, and payable by fewer of them than had been originally surcharged. Initially 17 of the Councillors were surcharged a total of £225,719.05 by the Auditor. Sixteen of the Councillors appealed the Auditor's decision and succeeded in having the amount reduced to £84,457.85 payable by 13 of them.

27. One commentator has expressed the opinion that the Northern Ireland model allows for greater review of the ombudsman's report than it is currently the practice to engage in. (Himsworth, *supra*, n 16, p 55).

"All section 7(8) does is to make the Commissioner's report and any recommendations made by him admissible for the purposes of the assessment proceedings as evidence of any facts stated in them. It may subsequently transpire that the facts on which the Commissioner acted are not wholly right. He may, for example, have been misled into supposing that the extent of the claimant's loss was greater or less than it actually is but, nevertheless, his finding of maladministration is not reviewable by the court. The court is only concerned with the assessment of damages or with the power to insist on specific action being taken if damages alone will not suffice to secure justice."²⁸

At best, then, the only manner in which the local or public body could challenge the report is to contest the facts on which the ombudsman based his findings of maladministration. If it could prove that these, or at least one of the more vital, facts were incorrect then the county court judge would not award damages. It would separately be open for the body to challenge the finding of maladministration in judicial review.²⁹

It would seem that the cumulative effect of these subsections is that the county court judge assesses the damage to the complainant on the basis of the ombudsman's report. The report is relied on because the facts contained therein are presumed to be correct. However, that presumption is rebuttable, and the facts may be found to be incorrect. If that is so, then the finding of maladministration will fall and damages will not be awarded. There is, however, no other way that an ombudsman's finding of maladministration can be challenged in these proceedings. It is difficult to envisage a clash over the facts. The reason that the facts rarely give rise to difficulties is, I suggest, to be found in the investigatory process. It is the practice of the Northern Ireland ombudsman's office, where the ombudsman proposes making a finding of maladministration, to forward the draft report to the body concerned with a request to check the facts set out therein and to verify their accuracy. Hence the possibility of a factual mistake in the report is almost certainly eliminated. The ombudsman's report has certainly never been challenged in this way in a county court hearing arising out of section 7, and the county court has, in practice, "rubber-stamped" the report. That the county court should not have a greater freedom to review the report than it presently exercises clearly accords with the intention of the draftspersons.

The second key issue is whether this power would easily transfer from Northern Ireland to Great Britain. Political and administrative structural differences between Northern Ireland and Great Britain mean that the power might not transfer easily from one to the other.

28. Letter, *supra*, n 15.

29. A number of such challenges have been mounted in the past. See, for example, Jones, "The Local Ombudsman and Judicial Review", [1988] *Public Law* 608 and also *R v Commissioner for Local Administration ex parte Croydon LBC* [1989] 1 All ER 1033. Indeed, Jones makes the point that the objections of those that oppose judicial enforcement on the basis that it would be "inappropriate and unfair, since local authorities do not enjoy a statutory right of appeal against an adverse report" have much less force (at 621).

The fact that Northern Ireland is a small jurisdiction means that the personality of the ombudsman may play a greater role than in Britain. In addition the traditional tensions that exist in Britain between central and local government, with the former, more often than not, being Conservative-run and the latter being Labour-controlled, are not found in Northern Ireland. It may be that because of this historical antagonism local authorities in Britain see the local government ombudsman service as an unnecessary, centrally imposed body fettering local authorities' discretion.

The tension in local government in Northern Ireland, on the other hand, exists between Unionist and Nationalist politicians within the council chambers, most especially between Unionist politicians and organisations that they perceive to be Sinn Féin fronts or as having Sinn Féin members. Probably, and most importantly, the small range of local governmental competencies in Northern Ireland, as compared to Britain, may also mean that conflict with the local government ombudsman is less likely than in Britain.³⁰ Bestowing a court enforcement power on ombudsmen may exacerbate existing tensions resulting in further "recalcitrance"³¹ by local authorities and possibly even a withdrawal, by some local authorities, from the jurisdiction of the ombudsmen.

The Northern Ireland model is a mechanism which converts "unsatisfactory outcomes" into "satisfactory outcomes", albeit that the body complained against may continue to harbour reservations about the ombudsman's report. Indeed the category of "unsatisfactory outcome" doesn't feature in the operation of the ombudsman's office in Northern Ireland. From the complainant's perspective section 7 is very welcome. It can only be initiated by complainants and, more importantly, will always ensure a satisfactory resolution of the dispute if the ombudsman's report has found maladministration sustaining injustice. It allows for no prolonged wrangling or prevarication by the body complained against and the respondent cannot "sit it out" by merely refusing to do anything about the report, as appears to be the case in Great Britain. By conferring on the complainant the right to make the application, the question of enforcement is taken out of the office's hands. Divorcing the office from the enforcement process may also contribute to the lack of resultant animosity between the ombudsman and the bodies subject to the jurisdiction of the office. As stated earlier the only involvement the office has in the process is to issue a Certificate of Authenticity, verifying the copy of the report, if requested to do so by the applicant.³² A previous Northern Ireland ombudsman expressed an additional advantage of the procedure by pointing out that with such a power backing his report the ombudsman has complete freedom to express

30. Northern Ireland local district councils are essentially responsible only for lesiure services, refuse collection and the setting of the local rate.

31. It would be over-simplistic to categorise all refusals to adhere to reports of the ombudsmen as unjustified obstinacy. The reasons for the local authorities' reactions may be more complex than this. For example, a local authority might not wish to adhere to a report that it feels is not adequately reasoned. See, Crawford, "Complaints, Codes and Ombudsmen in Local Government" [1988] *Public Law* 246 at 259.

32. This has been done on every occasion bar one.

his views, findings and suggestions for a remedy. An ombudsman without such a power might, in contrast, write a report with one eye on the respondent's reactions. He stated:

"Such freedom is, however, lacking in a situation where a commissioner has to tone down his language, his criticism and even his report and its findings for the purpose of ensuring that the report will in the end be acceptable to and acted upon by a particular body."³³

Nor does the existence of the power appear to adversely affect the ombudsman's relationship with local and public bodies.³⁴ The value of the power is that it is a method of involving the courts in the work of the ombudsman that strengthens the ombudsman's position, and not a procedure, like an appeal, that undermines it.

CONCLUSION

The mechanism has worked well in Northern Ireland and the model should not, I submit, be discarded too quickly. Whatever reservations the local authorities and the ombudsman may have from the complainants' perspective it certainly is more beneficial than the present system in Great Britain. However, the significant differences between the functions undertaken by local authorities in Great Britain and those in Northern Ireland mean that the procedure may not transfer easily across the Irish Sea. Given that the local authorities seem to be implacably opposed to such a development, court enforcement may prove to be useful in securing compliance with ombudsmen's reports as a weapon of last resort — a nuclear deterrent, so to speak — rather than as an actual sanction.³⁵

CIARAN WHITE*

33. Hugh Kernohan (Northern Ireland Ombudsman 1980-87) quoted in *Administrative Justice — Some Necessary Reforms*, The Justice — All Souls Committee Review of Administrative Law, Oxford, 1988, para 5.83.

34. Evidence of Hugh Kernohan, referred to in Select Committee Report, paras 20 and 24.

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